Affin Bank Bhd (formerly known as Perwira Affin Bank Bhd) v Abu Bakar bin Ismail

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 03(f)-05-10 OF 2017 (W)

TENGKU MAIMUN CHIEF JUSTICE, AZAHAR MOHAMED CJ (MALAYA), DAVID WONG CJ (SABAH AND SARAWAK), ROHANA YUSUF AND NALLINI PATHMANATHAN FCJJ

25 FEBRUARY 2020

Bankruptcy — Adjudication and receiving orders — Annulment of — Court of Appeal allowed application for annulment of adjudication and receiving orders ('AORO') under s 105 of the Bankruptcy Act 1967 ('the BA') — Issue related to point of time when debtor was considered to be able to pay his debts — Whether Court of Appeal erred in failing to appreciate that solvency of debtor under s 6(3) read together with s 105(1) of the BA necessarily relate to his ability to pay his debts as they become due, at the time of hearing of the creditor's petition — Whether Court of Appeal erred in taking into consideration respondent's ability to pay his debts based on subsequent change of circumstances — Bankruptcy Act 1967 ss 6(3) & 105

An adjudication order and receiving order ('AORO') was recorded against the respondent. The respondent then filed the first application for annulment under s 105 of the Bankruptcy Act 1967 ('the BA') which application was dismissed by the registrar. Aggrieved with the decision, the respondent filed an appeal to the High Court, which appeal was allowed. Subsequently, on appeal by the appellant to the Court of Appeal, the Court of Appeal restored the AORO. The respondent then instituted the second application for annulment under s 105 of the BA on the ground that he had assets in Singapore totalling SG$12,684,960.97 (equivalent to RM33,551,721.76) which exceeded the appellant's claim in the sum of RM8,342,774.10. The registrar allowed the application and the decision was affirmed by the High Court judge. The appellant subsequent appeal was dismissed by the Court of Appeal, hence, the present appeal. The Court of Appeal in dismissing the appeal and allowing the second annulment application had considered and accepted the argument raised by the respondent that he could pay his debts due to the Singapore judgment obtained subsequent to the AORO and subsequent to the dismissal of the first annulment application. The first question of law in the present appeal was where the court had already found that the AORO had been rightly made, whether the court may subsequently annul the AORO under s 105(1) of the BA, on the basis that such orders 'ought not to have been made', based on new arguments regarding the debtor's ability to pay his debts or subsequent change of circumstances. The second question of law was whether the solvency

of a debtor under s 6(3) read with s 105(1) of the BA must necessarily relate to his ability to pay his debts as they became due, as at the time of the making of the AORO and not to his ability subsequent to the making of the bankruptcy order.

Held, allowing the appeal with costs, and setting aside the annulment orders of the courts below:

(1) The Court of Appeal erred in failing to appreciate sufficiently that the solvency of the debtor under s 6(3) read together with s 105(1) of the BA must necessarily relate to his ability to pay his debts as they become due, at the time of hearing of the creditor's petition. It was trite that the solvency did not relate to the debtor's ability to pay his debts subsequent to the making of the AORO. Further, the solvency relates to 'commercial solvency' and not 'balance sheet solvency' (see para 48).

(2) At the time when the AORO was granted against the respondent, there was no evidence that he was solvent. No consideration ought to be given to the respondent's ability to pay his debts based on subsequent change of circumstances. If at all, any change of circumstances post AORO ie any recovery of moneys by the debtor would offer the debtor an opportunity to pay the debts in full which would enable him to obtain an annulment order, having made such full payment. But this was not done. The debtor made no payment to satisfy the judgment debt (see para 49).

(3) Having found that AORO was rightly made, the Court of Appeal erred in taking into account the Singapore judgment obtained after the AORO, which was not material to determine the solvency of the debtor at the date the AORO was made. The decision of the Court of Appeal in allowing the second annulment application by the debtor was contrary to the established principles of law and warranted appellate intervention (see para 50).

[Bahasa Malaysia summary

Perintah penerimaan dan perintah penghukuman ('AORO') telah direkodkan terhadap responden. Responden kemudian mengemukakan permohonan pertama untuk pembatalan di bawah s 105 Akta Kebankrapan 1967 ('Akta') di mana permohonannya ditolak oleh pendaftar. Terkilan dengan keputusan tersebut, responden merayu ke Mahkamah Tinggi, yang mana rayuan tersebut dibenarkan. Setelah itu, di atas rayuan oleh perayu ke Mahkamah Rayuan, Mahkamah Rayuan telah mengembalikan AORO. Responden kemudian mengemukakan permohonan kedua untuk pembatalan di bawah s 105 Akta dengan alasan bahawa dia mempunyai aset di Singapura berjumlah SG$12,684,960,97 (bersamaan RM33,551,721,76) yang melebihi tuntutan perayu dengan jumlah RM8,342,774.10. Pendaftar membenarkan permohonan tersebut dan keputusan tersebut disahkan oleh hakim

Mahkamah Tinggi. Rayuan perayu kemudiannya ditolak oleh Mahkamah Rayuan, oleh itu, rayuan semasa. Mahkamah Rayuan dalam menolak rayuan dan membenarkan permohonan pembatalan kedua telah mempertimbangkan dan menerima hujah yang dikemukakan oleh responden bahawa dia dapat membayar hutangnya kerana penghakiman Singapura yang diperoleh setelah AORO dan setelah penolakan permohonan pembatalan pertama. Persoalan undang-undang pertama dalam rayuan semasa adalah apabila mahkamah telah mendapati bahawa AORO telah dibuat dengan teratur, sama ada mahkamah kemudiannya boleh membatalkan AORO berdasarkan s 105(1) Akta, atas alasan bahawa perintah-perintah tersebut 'seharusnya tidak dibuat', berdasarkan hujahan baru mengenai kemampuan penghutang untuk membayar hutangnya atau perubahan keadaan selepas AORO direkodkan. Persoalan undang-undang kedua adalah sama ada kesolvenan penghutang di bawah s 6(3) dibaca dengan s 105(1) Akta semestinya berkaitan dengan kemampuannya membayar hutangnya ketika ia terakru, semasa AORO dibuat dan bukan atas kemampuannya selepas pembuatan perintah kebankrapan.

Diputuskan, membenarkan rayuan dengan kos dan mengenepikan perintah-perintah pembatalan oleh mahkamah bawahan:

(1) Mahkamah Rayuan terkhilaf kerana gagal menilai dengan secukupnya bahawa kesolvenan penghutang di bawah s 6(3) yang dibaca bersama dengan s 105(1) Akta semestinya berkaitan dengan kemampuannya membayar hutangnya ketika ia terakru, semasa pendengaran petisyen pemiutang. Ia adalah undang-undang yang mantap bahawa kesolvenan tidak berkaitan dengan kemampuan penghutang untuk membayar hutangnya setelah AORO diberikan. Selanjutnya, kesolvenan adalah berkaitan dengan 'commercial solvency' dan bukan 'balance sheet solvency' (lihat perenggan 48).

(2) Ketika AORO diperintahkan terhadap responden, tidak ada bukti yang menunjukkan bahawa dia solven. Kemampuan responden untuk membayar hutangnya berdasarkan perubahan keadaan tidak perlu dipertimbangkan. Jika ada, apa-apa perubahan keadaan selepas AORO iaitu penerimaan wang oleh penghutang akan memberi peluang kepada penghutang untuk membayar hutang tersebut sepenuhnya yang akan membolehkannya mendapatkan perintah pembatalan, setelah membuat pembayaran penuh. Tetapi ini tidak dilakukan. Penghutang tidak membuat pembayaran untuk memenuhi hutang penghakiman (lihat perenggan 49).

(3) Setelah mendapati bahawa AORO dibuat dengan teratur, Mahkamah Rayuan terkhilaf dengan mengambil kira penghakiman Singapura yang diperoleh setelah AORO, yang tidak material untuk menentukan kesolvenan penghutang pada tarikh AORO dibuat. Keputusan Mahkamah Rayuan dalam membenarkan permohonan pembatalan

kedua oleh penghutang bertentangan dengan prinsip undang-undang yang ditetapkan dan memerlukan campur tangan rayuan (lihat perenggan 50).]

Cases referred to

Asia Commercial Finance (M) Berhad v Bassanio Teo Yang [2009] MLJU 313; [2009] 9 CLJ 413, HC (refd)
Bank of Australasia v Hall (1907) 4 CLR 1514, HC (folld)
Bungsar Hill Holdings Sdn Bhd v Dr Amir Farid Datuk Isahak [2005] MLJU 671; [2005] 2 CLJ 809, FC (folld)
Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34, CA (folld)
Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd [2012] 6 MLJ 817, CA (folld)
Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (folld)
Mat Shah bin Safuan, Ex P United Asian Bank Bhd, Re [1991] 2 MLJ 48, HC (folld)
Paulin v Paulin and another [2010] 1 WLR 1057, CA (folld)
Sama Credit & Leasing Sdn Bhd v Pegawai Pemegang Harta, Malaysia [1995] 1 MLJ 274; [1995] 2 CLJ 368, SC (refd)
Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1992] 1 MLJ 313, SC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 6, 6(2), (3), 33, 105, 105(1)
Companies Act 1965 s 218(2)(a)
Insolvency Act 1986 s 282(1)

Appeal from: Appellate Jurisdiction No W-03(IM)-18–02 of 2016 (Court of Appeal Putrajaya)

Yoong Sin Min (Sharon Lim Pei Hsien and Sanjiv Naddan with him) (Shook Lin & Bok) for the appellant.
Abu Bakar bin Ismail (C Leo Camoens) for the respondent.

Tengku Maimun Chief Justice:

INTRODUCTION

[1] This appeal concerns the law on annulment of bankruptcy under s 105(1) of the Bankruptcy Act 1967 ('the BA 1967').

A BACKGROUND FACTS

[2] The appellant ('the bank') obtained a summary judgment against the respondent ('the debtor') on 8 July 2004. Thereafter the bank commenced bankruptcy proceedings against the debtor. The bankruptcy proceedings were B resisted by the debtor wherein he filed:

(a) an application to set aside the bankruptcy notice on 29 November 2010; and

C (b) notice of intention to oppose the creditor's petition on 20 June 2012.

[3] The High Court dismissed his application to set aside the bankruptcy notice. The decision of the High Court was affirmed by the Court of Appeal. The debtor's attempt to oppose the creditor's petition also suffered the same D fate. His notice of intention to oppose the creditor's petition was dismissed by the High Court and was upheld by the Court of Appeal.

[4] Following the dismissal of the debtor's application to set aside the bankruptcy notice and to oppose the creditor's petition, a receiving order and E an adjudication order ('the AORO') was recorded against him on 17 January 2013.

[5] On 16 December 2013, the debtor filed an application to annul the AORO ('the first annulment application') pursuant to s 105(1) of the F Bankruptcy Act 1967 ('the BA 1967'). The first annulment application was made on the ground that the debtor ought not to have been adjudged a bankrupt as he was solvent and that he had the means to repay his debts.

G **[6]** In support of his first annulment application, the debtor averred that:

(a) he had assets in Singapore in the form of a Singapore Court of Appeal judgment ('the Singapore judgment') dated 20 February 2013 which was granted in his favour;

H (b) the damages awarded pursuant to the said Singapore judgment (if assessed) would have a value in excess of SGD$35m; and

(c) that he had various claims against third parties in Singapore and as a result of the AORO, he was prevented from conducting his cases in Singapore and that he had difficulties in paying legal fees in Singapore. I

[7] On 7 January 2014, the registrar of the High Court dismissed the first annulment application. In her brief grounds of judgment the registrar made the following findings:

(a) that in an annulment application, the material date for consideration is the AORO date;

(b) that the Singapore judgment was obtained after the AORO date and therefore could not be taken into account for an application under s 105 of the BA 1967;

(c) that under s 105 of the BA 1967, the debtor has to prove that he 'ought not to have been adjudged bankrupt' at the time AORO was recorded against him which he had failed to prove;

(d) that the debtor had failed to prove that he was solvent as at the date of the AORO; and

(e) that the debtor had never raised the issue that he was solvent in his previous application to set aside the bankruptcy notice and in his application to oppose the creditor's petition and/or when the AORO was recorded against him.

[8] Dissatisfied with the decision of the registrar, the debtor appealed to the High Court judge, which appeal was allowed. However, on appeal by the bank to the Court of Appeal, the decision of the High Court judge was reversed and the AORO was restored. The debtor did not file any application for leave to appeal to the Federal Court against the order of the Court of Appeal restoring the AORO.

[9] What the debtor did instead was to file, nine months later, the second annulment application on, inter alia, the following grounds:

(a) that on 13 April 2015, pursuant to the Singapore judgment, the Singapore High Court had assessed damages in favour of the debtor in the sum of SGD$9,928,473.75 together with interest at the rate of 5.33%pa from 15 September 2009 to date of payment;

(b) that the damages which was awarded against one Chenet Finance Ltd was to be paid by Chenet Finance Ltd to the Director General of Insolvency Malaysia ('DGI') as the receiver of the debtor; and

(c) that the debtor had been awarded costs of SGD$15,000.

[10] The debtor thus alleged that he had assets in Singapore totalling SGD$12,684,960.97 (equivalent to RM33,551,721.76) which exceeded the bank's claim as admitted by the DGI, in the sum of RM8,342,774.10.

[11] The second annulment application was allowed by the registrar of the High Court. The decision of the registrar was affirmed by the High Court judge. Against the decision of the High Court judge, the bank appealed to the

Court of Appeal. The appeal was dismissed. In dismissing the said appeal, the Court of Appeal held that:

(a) the AORO was rightly made on 17 January 2012 as at that material time, there was no evidence of the debtor's solvency or ability to pay;

(b) when the Singapore judgment was delivered on 20 February 2013, the debtor had a right to apply under s 105(1) of the BA 1967 as there was sufficient evidence to show that he was solvent;

(c) there was a change of circumstances as the DGI was not able to assess damages under the Singapore judgment since 17 January 2013; and

(d) since there was a change of circumstances, res judicata does not apply.

PROCEEDINGS IN THE FEDERAL COURT

[12] The bank obtained leave from this court to appeal against the decision of the Court of Appeal on the following questions of law:

(a) where the court had already found that the adjudication and receiving orders had been rightly made, whether the court may subsequently annul the adjudication and receiving orders under s 105(1) of the BA 1967, on the basis that such orders 'ought not to have been made', based on new arguments regarding the debtor's ability to pay his debts or subsequent change of circumstances?

(b) whether the solvency of a debtor, under s 6(3) read with s 105(1) of the BA 1967, must necessarily relate to his ability to pay his debts as they became due, as at the time of the hearing of the creditor's petition, and not relate to his ability subsequent to the receiving and adjudication orders made;

(c) where the adjudication and receiving orders have been made on the basis that the debtor is unable to pay his debts and where the debtor's first application for the annulment of the adjudication and receiving orders have already been dismissed, does the principle of res judicata apply to preclude a second annulment application? and

(d) where a debtor is able to recover monies subsequent to the proper making of the adjudication and receiving orders against him, whether the court ought to allow his application to annul the adjudication and receiving orders, rather than for him to forward such monies to the Director General of Insolvency, for the settlement of his debts and to discharge his bankruptcy.

[13] We had answered the first question in the negative and the second question in the affirmative. We found no necessity to answer the third and the fourth questions. We now provide our reasons.

PARTIES' ARGUMENTS

[14] It was submitted for the bank that the Court of Appeal erred:

(a) in not giving due consideration to the fact that the debtor had already failed in his first annulment application;

(b) in considering and taking into account the Singapore judgment of 20 February 2013 which took place subsequent to the making of the AORO and which had already been one of the grounds for the debtor's failed first annulment application; and

(c) in considering and relying on the DGI's lack of ability in assessing damages in Singapore, which was not even raised as a ground under the second annulment application.

[15] For the debtor, learned counsel argued that the time to consider whether a bankruptcy order ought not to have been made at the date of the adjudication must be after such an order, not at the time of the order. To hold otherwise, submitted learned counsel, would be to frustrate the intent of s 105 which is to afford relief of annulment to a person adjudicated bankrupt.

[16] Learned counsel for the debtor relied on *Bungsar Hill Holdings Sdn Bhd v Dr Amir Farid Datuk Isahak* [2005] MLJU 671; [2005] 2 CLJ 809, where the Court of Appeal after reviewing the facts of the case and new evidence provided in the appeal regarding the debtor's ability to pay his debt, exercised its discretion to annul the bankruptcy order. The decision of the Court of Appeal was affirmed by this court. It was therefore posited for the debtor that the High Court registrar, the High Court judge and the Court of Appeal did not err in ordering/affirming the annulment of the bankruptcy order.

OUR DECISION

The first question

[17] The issue in relation to the first question revolves on the point of time when the debtor is considered to be able to pay his debts.

[18] Section 6 of the BA 1967 provides for proceedings and order on creditor's petition where sub-s (2) and (3) read:

> (2) At the hearing the court shall require proof of —
>
> (a) the debt of the petitioning creditor; and
>
> (b) the act of bankruptcy or, if more than one act of bankruptcy is alleged in the petition, some of the alleged acts of bankruptcy; and

A (c) if the debtor does not appear, the service of the petition, and if satisfied with the proof may make a bankruptcy order in pursuance of the petition.

(3) If the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to B be made, the court may dismiss the petition.

[19] The annulment of bankruptcy order is provided for in s 105 and sub-s (1) of s 105 states:

C (1) Where in the opinion of the court a debtor ought not to have been adjudged a bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the D Republic of Singapore and that the distribution ought to take place in that country, the court may annul the bankruptcy order.

[20] The Court of Appeal, in affirming the decision of the High Court and in allowing the second annulment's application had considered and accepted E the argument raised by the debtor that he could pay his debts due to the Singapore judgment obtained subsequent to the AORO ('adjudication/bankruptcy order') and subsequent to the dismissal of the first annulment application.

F **[21]** Learned counsel for the debtor submitted that as in *Bungsar Hill v Dr Amir Farid*, the debtor in the instant appeal had assets to satisfy his debt.

[22] Given the reliance by the debtor on *Bungsar Hill*, we will now examine the case. In *Bungsar Hill*, the respondent/debtor had been a partner with two G other doctors in a partnership called 'Poliklinik Kotaraya'. The respondent had a 35% share in the partnership. In 1989, a dispute arose between the partners leading to the filing of several suits in court. On 13 March 1990, the High Court appointed two interim receivers and managers to manage the partnership pending final settlement of the dispute. The receivers were, among H others authorised by the court to pay each of the partners a monthly allowance of RM4,000. On 30 November 1990, the appellant obtained summary judgment against the respondent for the sum of RM32,095.41 together with interest and costs. On 12 May 1993, a bankruptcy notice was issued. On 11 November 1993, the partners entered into a settlement agreement which I among others provides for the appointment of interim receivers and managers 'to receive and manage the affairs of the Practice pending the disposal of the Civil Suits ...' and for the sale of the partnership. The bankruptcy notice was served on the respondent by way of substituted service on 31 January 1994 and on 29 July 1994, a creditor's petition was filed. It was also served by way of

substituted service on 11 May 1996. The creditor's petition was heard by the senior assistant registrar of the High Court on 27 June 1995. The respondent did not appear nor contest the petition. The receiving order and adjudication order were thus made against the respondent.

[23] On 10 January 1996, the respondent applied to set aside and to annul the receiving and adjudication orders on the sole ground that arising from the dissolution of the partnership, monies would become due and payable to him upon the completion of the liquidation of the affairs of the partnership by the liquidator.

[24] The senior assistant registrar of the High Court dismissed the respondent's application to set aside the receiving and adjudication orders made against him. On the respondent's appeal to the judge in chambers, the receiving and adjudication orders were set aside. The order of the learned judge was affirmed by the Court of Appeal. The appellant was granted leave by this court to appeal on the following issues:

(a) whether the words 'where in the opinion of the court a debtor ought not to have been adjudged bankrupt' in s 105(1) of the BA 1967 covered only technical grounds;

(b) whether the debtor's 'ability to pay his debt' was a legal ground that fell within the said provision;

(c) whether the respondent's non-appearance at the hearing of the creditor's petition disqualified him from making the setting aside application; and

(d) whether the learned judge was correct on the facts in finding that the respondent was solvent and able to pay his debt.

[25] In delivering the judgment of this court, Abdul Hamid Mohamed FCJ (as he then was) said at p 825:

> (a) The phrase 'where in the opinion of the court a debtor ought not to have been adjudged bankrupt ...' covers not only purely technical grounds like defective service of the bankruptcy notice or the creditor's petition but also covers other legal grounds like an abuse of the process of the court.
>
> (b) While the debtor's 'ability to pay his debt' may not be a 'technical ground', it is a 'legal ground' which falls within the scope of the said phrase;
>
> (c) In the circumstances of this case, the fact that the debtor did not appear at the hearing to contest the petition does not disqualify him from applying for the annulment of the adjudication order pursuant to s 105(1) of the Act.

(d) On the facts of this case, there is no reason for this court to interfere with the findings of fact of the learned judge that the respondent was solvent and was able to pay his debt or with the exercise of his discretion.

[26] And at pp 820–821 (CLJ), the learned FCJ said:

> Learned counsel for the appellant argued that the material date to consider whether the respondent was able to pay the debt or not ought to be the date of the hearing of the creditor's petition. ...
>
> From the judgment of the learned judge, it appears quite clearly that the material date considered by him was the date of adjudication, which in this case is also the date of hearing of the creditor's petition ...
>
> In the circumstances, this argument ought not to have been forwarded because that was what the learned judge did: he considered the respondent's ability to pay his debt or solvency or insolvency as at the date of adjudication which was also the date of the hearing of the creditor's petition.
>
> That, in my view, is the correct date for consideration. First it should be noted that in the first limb of s 105(1) the words 'ought not to have been adjudged bankrupt' are used. It denotes past tense. On the other hand, in the second limb, the words 'the debts of the bankrupt are paid in full' which denotes the present tense, are used. Similarly, in the third limb, the present tense 'are pending' is used. This clearly indicates that the material date for consideration in the case of the first limb, is a date in the past which, logically is the date of adjudication.

[27] In respect of the material date to be considered in an application for annulment under the first limb, the Supreme Court in *Sama Credit & Leasing Sdn Bhd v Pegawai Pemegang Harta, Malaysia* [1995] 1 MLJ 274; [1995] 2 CLJ 368, held similar view. Chong Siew Fai SCJ said at pp 278–279 (MLJ):

> One of the ways a bankruptcy may be disposed of is by annulment. Section 105(1) of the Act provides, inter alia, two situations under which an annulment may be granted:
>
> (1) where in the opinion of the court the debtor ought not to have been adjudged bankrupt; or
>
> (2) where the debts are paid in full.
>
> The first situation is relevant in our case. And, in considering whether a receiving order ought to have been made, the appellate court would consider the actual state of affairs at the date of the order and would, generally speaking, not take into account matters that had occurred after that date. In *Re Dunn (A Bankrupt), ex p Official Receiver v Dunn* [1949] Ch 640; [1949] 2 All ER 388 (CA) Sir Raymond Evershed MR said at p 392:
>
> > I think counsel for the Official is right in saying that, in judging whether the order ought to have been made, the court is entitled to have regard to the actual date of affairs at the date of the order, which may appear from evidence subsequently filed, and certainly would not appear from the bare statement on the formal petition which alone was before the court when the order was made.

> I do not think, however, that one is entitled, in determining whether the order ought to have been made under the first limb of the subsection, to take into account facts which have occurred after the date of the order.

[28] Similar principles were propounded by the English Court of Appeal in *Paulin v Paulin and another* [2010] 1 WLR 1057 where Wilson LJ stated thus at p 1074:

> Section 272(1) of the 1986 Act provides 'A debtor's petition may be presented to the court only on the grounds that the debtor is unable to pay his debts'. Section 282(1) of the same Act provides:
>
> > The court may annul a bankruptcy order if it at any time appears to the court — (a) that, on the grounds existing at the time the order was made, the order ought not to have been made.
>
> A reading of the above two subsections together yields the uncontroversial conclusion that a court may annul a bankruptcy order if it concludes that, on the date of that order, the bankrupt was able to pay his debts. But, even if it so concludes, the word 'may' confers upon the court a discretion whether to annul the order.

[29] The position is also clearly stated by the authors of *Halsbury's Laws of England* 4th Ed Reissue (Vol 3(2)) at pp 326–327 at paras 598–599:

> ... The court may annul a bankruptcy order if it at anytime appears to the court: (1) that, on the grounds existing at the time the order was made, the order ought not to have been made; or ...
>
> ... the grounds on which the order ought not to have been made must have been existing at the time the bankruptcy order was made.

[30] Thus, the authorities clearly established that the relevant date to consider whether the debtor is able to pay his debts is the date of the making of the AORO.

[31] We therefore answered the first question in the negative.

[32] Coming back to *Bungsar Hill v Dr Amir Farid*, it was decided on its peculiar facts, in particular, when the bankruptcy order was made, the respondent/debtor was absent and there was already a settlement agreement which provides for the sale of the partnership. In the instant case, there was no evidence of the debtor's solvency at the date of the bankruptcy order. After the decision of the Court of Appeal on the second annulment application, the solicitors for the bank wrote to the debtor's solicitors enquiring among others, the steps taken by the debtor to recover the judgment sum awarded by the Singapore High Court order dated 13 April 2015. Although there was a reply,

A the debtor's solicitors did not address the bank's solicitors query as to the recovery effort.

[33] *Bungsar Hill v Dr Amir Farid* is certainly not an authority to support the debtor's contention that the date for consideration whether a debtor ought not to have been adjudged a bankrupt, is after the bankruptcy order was made. The position taken by the debtor goes against the principle of law.

[34] Insofar as the DGI's inability to assess damages pursuant to the Singapore judgment is concerned, with respect, we found that to be a non-issue. The DGI is not expected to pursue legal actions already instituted by the bankrupt prior to his bankruptcy. We noted that the DGI lack funds and resources and that most bankrupts would seek leave of the DGI to appoint solicitors to represent his estate in such litigation and more often than not, the DGI would grant leave or sanction. Indeed in the instant case, the debtor did engage lawyers in Singapore during his bankruptcy, presumably with the sanction of the DGI, to have the damages assessed, which led to the Singapore High Court assessment order dated 13 April 2015.

The second leave question

[35] The second question is whether the solvency of a debtor under s 6(3) read with s 105(1) of the BA 1967 must necessarily relate to his ability to pay his debts as they became due, as at the time of the making of the AORO and not to his ability subsequent to the making of the bankruptcy order.

[36] The debtor alleged that he was solvent premised on the Singapore judgment dated 20 February 2013, which he claimed would be more than SGD$35m. The debtor's contention found favour with the Court of Appeal. This same Singapore judgment was relied upon by the debtor in his first annulment application. And the High Court and the Court of Appeal dismissed the debtor's first annulment application.

[37] There are thus two Court of Appeal decisions. The first decision dated 17 September 2014 was in respect of the first annulment application where despite the Singapore judgment, the Court of Appeal found that the debtor was not solvent as at the date of the AORO. The second decision dated 6 March 2017 was the decision appealed against in the instant case where the Court of Appeal formed the view that the debtor was solvent based on the Singapore judgment and that the debtor had the right to apply for an annulment under s 105(1) of the BA 1967.

[38] As set out above, this court in *Bungsar Hill v Dr Amir Farid* held that the material date to determine the solvency and ability of the debtor to pay his

debts was the date when the creditor's petition was heard and the AORO made. What then is the definition or meaning of 'debtor was able to pay his debt' or the test of solvency or the ability of an individual to pay his debts?

[39] In a corporate insolvency case of *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 at p 454, the Supreme Court held as follows:

> In short, the question is not whether the debtor's assets exceed his liabilities as appeared in the books of the debtor, but whether there are moneys presently available to the debtor, or which he is able to realise in time, to meet the debts as they become due. It is not sufficient that the assets might be realizable at some future date after the debts have become due and payable.

[40] In *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313, the respondent obtained judgment against the appellant. A demand under s 218(2)(a) of the Companies Act 1965 was then served on the appellant. As the appellant failed to pay the debt demanded, the respondent presented a winding up petition against the appellant, on the ground that having failed to comply with the statutory demand, the appellant was presumed insolvent and unable to pay its debts. The High Court granted the winding up order against the appellant. It was concluded that the appellant had not rebutted the statutory presumption.

[41] The appellant appealed to the Supreme Court where it was contended that the learned judge below had applied the wrong legal test and that the correct test should be whether the appellant would be capable, if necessary, of paying all its debts by a realisation of its assets, including any immoveable property.

[42] The Supreme Court dismissed the appellant's appeal. Gunn Chit Tuan SCJ said:

> In this case, the presumption of insolvency arises when the requirements of s 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. In dealing with 'commercial insolvency', that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the *Malayan Plant Case* and cite the following observations from *Buckley on the Companies Act* (13th Ed) at p 460:
>
> > In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.

Applying the test in the above-quoted observations, we therefore held that the learned judge had exercised his discretion correctly in ordering the appellant to be wound up.

[43] Similar principles on the test of commercial insolvency were enunciated in the Court of Appeal decisions in *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34 and *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817.

[44] As for individual insolvency, the High Court in *Re Mat Shah bin Safuan, Ex P United Asian Bank Bhd* [1991] 2 MLJ 48 held:

> The ability to settle any judgment debt in full under s 6(3) of the Bankruptcy Act 1967 must be established before the act of bankruptcy is committed, ie before the expiry of seven days after service of the bankruptcy notice on the debtor. In this case the debtor had already committed an act of bankruptcy and it is therefore too late at this stage of the proceedings for him to submit that he has sufficient assets with which he can pay the judgment debt in full.

[45] The English Court of Appeal in *Paulin v Paulin*, in dealing with s 282(1) of the Insolvency Act 1986, which is substantially the same as our s 105(1) of the BA 1967, stated:

> 41 It is well established that the inquiry into whether the relevant date the bankrupt was able to pay his debts is an inquiry not into whether his liabilities exceeded his assets ('balance sheet insolvency') but into whether he could meet his liabilities when they were due ('commercial insolvency'). Often quoted in this context are the words of Mr David Oliver QC, sitting as a deputy judge of the High Court, Chancery Division, in *In re Coney (A Bankrupt)* [1998] BPIR 333, 335:
>
> > Inability to pay one's debts, at least in the context of insolvency, has historically long been construed as an inability to pay one's debts at the time that they are due ... The counterpart to this approach to solvency is that even if one's liabilities exceed one's assets on a balance sheet basis, it does not follow that a person is insolvent, albeit that it is all the more likely to result in a state of the individual's relations with his bankers constituting the ultimate test of insolvency.
>
> Mr Oliver added, however at p 336:
>
> > It would not normally be right ... to annul a bankruptcy order unless at least it is shown that as at the date of the order the debtor was in fact able to pay his debts, or had some tangible and immediate prospect of being so able which has since been fulfilled or would have been so but for the order itself. It is with regard to a 'tangible and immediate prospect' that the assets and liabilities of a debtor and their nature will usually be of relevance.

[46] The High Court of Australia alluded to the same principle in the case of *Bank of Australasia v Hall* (1907) 4 CLR 1514 where it was held at p 1528:

> The question is not whether the debtor would be able, if time were given him, to pay his debts out of his assets, but whether he is presently able to do so with moneys actually available.

[47] Applying the principles set out in the above cited cases, the test for solvency of a debtor must be of the debtor's ability to pay his debts as they become due, as at the time of the hearing of the creditor's petition, when the AORO was made. The argument of learned counsel for the debtor that the time to consider whether a bankruptcy order ought to have been made, must be after such an order and not at the time of the order, is against the established principles of law. A bankrupt could always avail himself of the relief of annulment or discharge by making payment from moneys recovered subsequent to the AORO, to the DGI (see ss 105(1) and 33 of the BA 1967 and the case of *Asia Commercial Finance (M) Berhad v Bassanio Teo Yang* [2009] MLJU 313; [2009] 9 CLJ 413). We therefore answered question 2 in the affirmative.

CONCLUSION

[48] We found that the Court of Appeal erred in failing to appreciate sufficiently that the solvency of the debtor under s 6(3) read together with s 105(1) of the BA 1967 must necessarily relate to his ability to pay his debts as they become due, at the time of hearing of the creditor's petition. It is trite that the solvency does not relate to the debtor's ability to pay his debts subsequent to the making of the AORO. Further, it relates to 'commercial solvency' and not 'balance sheet solvency'.

[49] In the instant case, at the time the AORO was granted against the debtor, there was no evidence that he was solvent. No consideration ought to be given to the debtor's ability to pay his debts based on subsequent change of circumstances. If at all, any change of circumstances post AORO ie any recovery of moneys by the debtor would offer the debtor an opportunity to pay the debts in full which would enable him to obtain an annulment order, having made such full payment. But this was not done. The debtor made no payment to satisfy the judgment debt.

[50] Having found that AORO was rightly made, the Court of Appeal erred in taking into account the Singapore judgment obtained after the AORO, which was not material to determine the solvency of the debtor at the date the AORO was made. The decision of the Court of Appeal in allowing the second annulment application by the debtor was, with respect contrary to the established principles of law and warrants appellate intervention. The appeal was consequently allowed with costs, and the annulment orders of the courts below were set aside.

Appeal allowed with costs with costs; annulment orders of courts below set aside.

Reported by Dzulqarnain Ab Fatar